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No. 03-418

In the Supreme Court of the United States

GABRIEL J. MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2501, civil actions filed in the Court of Federal Claims must be commenced "within six years after such claim first accrues." The question presented is whether a former service member's claims in a lawsuit challenging administrative actions by the Army that led to the forfeiture of two months' pay and then to his involuntary separation from active duty first accrued when the pay was forfeited and he was separated from active duty or when the Army Board for Correction of Military Records rejected his application for review of the administrative actions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Blassingame v. *Secretary of Navy*, 811 F.2d 65 (2d Cir. 1987)	10
Bonen v. *United States* 666 F.2d 536 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982)	6
Crown Coat Front Co. v. *United States*, 386 U.S. 503 (1967)	11
Darby v. *Cisneros*, 509 U.S. 137 (1993)	8
Dougherty v. *United States Navy Bd. for Corr. of Naval Records*, 784 F.2d 499 (3d Cir. 1986)	10
Friedman v. *United States*, 310 F.2d 381 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963)	5, 6, 8
Geyen v. *Marsh*, 775 F.2d 1303 (5th Cir. 1985)	10
Hurick v. *Lehman*, 782 F.2d 984 (Fed. Cir. 1986)	3
Pacyna v. *Marsh*, 617 F. Supp. 101 (W.D.N.Y. 1984), aff'd, 809 F.2d 792 (Fed. Cir. 1986), cert. denied, 481 U.S. 1048 (1987)	6
Patsy v. *Board of Regents*, 457 U.S. 496 (1982)	8
Sims v. *Apfel*, 530 U.S. 103 (2000)	8
Smith v. *Marsh*, 787 F.2d 510 (10th Cir. 1986)	10
Soriano v. *United States*, 352 U.S. 270 (1957)	4, 6, 7

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.*	5
5 U.S.C. 702	10
5 U.S.C. 704	10
Military Pay Act, 37 U.S.C. 204	7

Statutes and regulation—Continued:	Page
National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012	10
§ 503, 115 Stat. 1080-1085	10
10 U.S.C. 1558	10
10 U.S.C. 1558 note	11
10 U.S.C. 1558(b)(1)(A)	10-11
10 U.S.C. 1558(b)(1)(B)	11
10 U.S.C. 1558(b)(2)(A)	10
10 U.S.C. 1558(f)(1)	10
Tucker Act:	
28 U.S.C. 1491(a)(1)	4
28 U.S.C. 2501	3, 6
Uniform Code of Military Justice, 10 U.S.C. 815 (Art. 15)	2, 3
10 U.S.C. 1552	2, 4, 5
10 U.S.C. 1552(c)	7
28 U.S.C. 2401(a)	3
32 C.F.R. 581.3	5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A71) is reported at 333 F.3d 1295. The opinion of the United States Court of Federal Claims (Pet. App. B1-B15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2003. The petition for a writ of certiorari was filed on September 15, 2003. The jurisdiction of this Court is mistakenly invoked under 28 U.S.C. 1259(3). The applicable jurisdictional provision is 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was commissioned as a reserve officer in the United States Army in 1979 and entered active duty in 1980. Pet. App. B1-B2. In March 1991, he was issued a letter of reprimand for failing to follow proper procedures concerning leave. *Id.* at B2-B3. Later in 1991, after a proceeding under Article 15 of the Uniform Code of Military Justice, 10 U.S.C. 815, petitioner was ordered to forfeit two months' pay for fraternizing with an enlisted woman, engaging in a sexual relationship with her, and related offenses. Pet. App. B3-B5. In February 1992, petitioner was removed from active duty as a result of his misconduct. *Id.* at B5-B6. At the time of his release, petitioner had attained the rank of captain. *Id.* at B5.

In April 1994, a board of officers convened to consider whether petitioner should be removed from the Army Reserve. Pet. App. B6. It concluded that petitioner had not committed the offenses he was found to have committed at the Article 15 proceeding and recommended that he remain in the Reserve. *Ibid.* In May 1994, petitioner was notified that he had not been selected for promotion to the rank of major. *Ibid.*

In March 1995, petitioner made an application to the Army Board for Correction of Military Records (Correction Board or Board) pursuant to 10 U.S.C. 1552. Pet. App. B7. He sought retroactive reinstatement to active duty, promotion to major, back pay, return of his forfeited pay, and expungement of the letter of reprimand and the Article 15 proceeding. *Ibid.* In August 1995, the Correction Board denied petitioner's request, finding that his removal from active duty was proper. *Id.* at B7-B8. On March 25, 1997, petitioner was separated from the Army Reserve after having been passed

over a second time for promotion to major. *Id.* at B9. The next day, the Correction Board denied petitioner's request for reconsideration of his application. *Ibid.*

2. On August 17, 1998, petitioner filed suit in the Court of Federal Claims. Pet. App. B9. Alleging that the Correction Board's decision was arbitrary, capricious, and unsupported by substantial evidence, petitioner sought retroactive reinstatement to active duty, back pay, return of the pay forfeited as a result of the Article 15 proceeding, and correction of his records. *Ibid.*

The court dismissed the suit as untimely. Pet. App. B1-B15. Relying on 28 U.S.C. 2501, which requires that a claim in the Court of Federal Claims be filed "within six years after such claim first accrues," and on the Federal Circuit's decision in *Hurick* v. *Lehman*, 782 F.2d 984 (1986), which interpreted the analogous provision for suits against the United States in district court, 28 U.S.C. 2401(a), the court held that petitioner's claim for the return of the forfeited pay accrued in 1991, when the pay was forfeited, and that his claim for active-duty back pay accrued in 1992, when he was separated from active duty. Pet. App. B11-B12. The court rejected petitioner's argument that his claims did not accrue until 1995, when the Correction Board refused to correct his records. *Id.* at B10, B13. The court stated that *Hurick* had "squarely rejected" that argument in holding that resort to a correction board is optional and does not give rise to a "separate and independent claim." *Id.* at B13 (quoting *Hurick*, 782 F.2d at 987).

3. Petitioner appealed to the Federal Circuit. Pet. App. A8. The court granted en banc review and invited the parties to address the question whether *Hurick* should be overruled. *Ibid.* A divided en banc court de-

clined to do so and affirmed the Court of Federal Claims' dismissal of petitioner's complaint. *Id.* at A1-A71.

a. In a section of its opinion joined by 10 of the 13 judges who heard the case (Pet. App. A2), the court first held that petitioner's claim for recovery of the monetary losses he suffered as a result of his discharge from active duty accrued on the date of the discharge. *Id.* at A10-A28. Applying the established principle that a cause of action under the Tucker Act, 28 U.S.C. 1491(a)(1), "accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit" (Pet. App. A12), the court noted that it had long held in military-discharge cases that a former service member's claim for back pay accrues on the date of the discharge and is barred if suit is not brought within six years of that date. *Id.* at A12-A13. The court rejected petitioner's argument that his claims did not accrue until the Correction Board's decision. *Id.* at A13-A28. Citing, among other decisions, *Soriano* v. *United States*, 352 U.S. 270 (1957), the court concluded that resort to the Correction Board is not a prerequisite to bringing a Tucker Act suit, and thus that the running of the limitations period is not tolled while a claim is pending before the Board. Pet. App. A13-A28.

In a section of its opinion joined by seven judges (Pet. App. A2), the court of appeals next held that the Correction Board's decision did not give rise to a separate cause of action with a new limitations period. *Id.* at A29-A39. Relying on longstanding precedent, including *Hurick* (*id.* at A30-A32), the court explained that the correction-board statute, 10 U.S.C. 1552, does not "creat[e] a new and independent cause of action" for back pay, but simply "provide[s] for further review of a ruling on a cause of action." Pet. App. A31 (quoting

Friedman v. *United States*, 310 F.2d 381, 397 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963)). Even though Section 1552 "mandates the payment of money if the correction board concludes that the service member's discharge was unlawful," the court said, Section 1552 "is not the 'money-mandating' statute that gives rise to the cause of action." *Id.* at A38. Instead, the basis for a military back-pay suit comes from "a different statute, such as the Military Pay Act, 37 U.S.C. § 204." *Id.* at A38. Rejecting petitioner's contention that *Hurick* "is contrary to the decisions of several other courts of appeals" (*id.* at A33), the court explained that those cases were challenges under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, that sought equitable relief, not Tucker Act suits for money. Pet. App. A33-A36.

In the final two sections of its opinion, each of which was joined by 10 judges (Pet. App. A2), the court rejected petitioner's argument that the statute of limitations should be tolled (*id.* at A39-A48) and rejected his argument that the non-monetary portion of the case should be transferred to a district court (*id.* at A48-A50).

b. Judge Plager filed a dissenting opinion that was joined by five other judges. Pet. App. A51-A71. In his view, the statute (10 U.S.C. 1552) and the regulation (32 C.F.R. 581.3) that govern the Correction Board are "money-mandating" provisions creating a separate cause of action that is enforceable under the Tucker Act and accrues at the time of the Correction Board's decision. Pet. App. A57-A64.

ARGUMENT

Petitioner contends (Pet. 3-9) that the court of appeals erred in holding that the limitations period of 28 U.S.C. 2501 ran from the date of the underlying actions taken by the military rather than the date of the Correction Board's rejection of petitioner's challenge to those actions. Further review is not warranted. The decision of the court of appeals is correct; it does not conflict with the decision of any other court of appeals; and its significance is diminished by the recent enactment of a law that requires, in certain circumstances, the exhaustion of a correction-board remedy before a service member may seek judicial review. The claim raised by petitioner has been consistently rejected by the Federal Circuit and its predecessor over the last four decades (see Pet. App. A12-A14, A30-A32), and this Court has repeatedly denied review.[1] There is no reason for a different result here.

1. a. The court of appeals correctly held (Pet. App. A10-A28) that exhaustion of the Correction Board remedy is optional; that the limitations period for petitioner's claim for recovery of the monetary losses he suffered as a result of his discharge from active duty therefore ran from the date of the discharge; and that the limitations period was not tolled pending the exhaustion of the administrative remedy. That ruling is consistent with this Court's decision in *Soriano* v. *United States*, 352 U.S. 270 (1957), which holds that the limitations period of Section 2501 begins to run when

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[1] See, *e.g.*, *Pacyna* v. *Marsh*, 617 F. Supp. 101 (W.D.N.Y. 1984), aff'd, 809 F.2d 792 (Fed. Cir. 1986) (Table), cert. denied, 481 U.S. 1048 (1987); *Bonen* v. *United States*, 666 F.2d 536 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982); *Friedman* v. *United States*, 310 F.2d 381, 396-403 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963).

suit can first be brought, not when an optional administrative remedy has been exhausted. *Id.* at 273-275.

Petitioner contends (Pet. 4-6) that the Correction Board's decision creates a separate cause of action, for which the six-year limitations period begins anew. The court of appeals' contrary holding (Pet. App. A29-A39) is correct. As the court explained, the problem with this "second cause of action" theory is that, in order for petitioner's claim to be within the Tucker Act jurisdiction of the Court of Federal Claims, "it had to be for money owing to him," and the only money that he claims is owing to him is "the back pay withheld from the date of his separation from active duty in February 1992" and "the forfeiture of pay pursuant to his Article 15 punishment in 1991." *Id.* at A29. If petitioner is entitled to that money, his right to it "accrued in 1991 and 1992," when "he was deprived of the money." *Ibid.* The Board's decision years later "did not cause [petitioner] monetary injury, but merely failed to remedy the injury he had previously suffered." *Id.* at A35. While the Correction Board statute is a "money-mandating" statute in the sense that it requires the government to grant monetary relief to a service member if the Board determines that the service member's record should be corrected in a way that creates an entitlement to back pay, see 10 U.S.C. 1552(c),[2] it is not Section 1552, but some other statute, such as the Military Pay Act, 37 U.S.C. 204, that is the source of the right to back pay. Pet. App. A37-A38.

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[2] Section 1552(c) provides that the Secretary of a military department "may pay, from applicable current appropriations, a claim for the loss of pay * * * or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant."

b. The other grounds on which petitioner challenges the court of appeals' decision are equally without merit. First, petitioner contends (Pet. 7) that the court's decision is inconsistent with the presumption in favor of judicial review of a final agency decision. The court correctly rejected the suggestion that "the existence of judicial review" requires the conclusion that "the limitations period runs from the time of the Correction Board's decision." Pet. App. A31 (quoting *Friedman*, 310 F.2d at 397). As the court explained, "[a]ll that the existence of judicial review means is that the Board's decision will be reviewed, in a proper case, if a timely suit is brought." *Ibid.* (quoting *Friedman*, 310 F.2d at 397).

Second, petitioner contends that there are "prudential and practical reasons for requiring exhaustion of available administrative remedies," and that the court of appeals' decision "undermines the importance and utility of exhaustion." Pet. 7. The court correctly rejected that contention as well. Pet. App. A16-A28. As an initial matter, whether exhaustion is required in any particular context is, as the court noted, a matter of "congressional intent." *Id.* at A16 (citing *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000), *Darby* v. *Cisneros*, 509 U.S. 137, 144-145 (1993), and *Patsy* v. *Board of Regents*, 457 U.S. 496, 501 (1982)). And the "historical evidence" (*id.* at A19) reviewed by the court (*id.* at A19-A22) supports its "consistent interpretation of the correction board legislation as creating a permissive avenue for collateral administrative relief, not a mandatory prerequisite to suit" (*id.* at A19). That historical evidence includes contemporaneous Tucker Act cases holding that exhaustion of administrative remedies was not required and the absence of any suggestion that a correction-board remedy was intended to be mandatory rather

than permissive. *Id.* at A21. In any event, while, as the court acknowledged, "there are often benefits to be obtained from pre-suit exhaustion of administrative remedies" (*id.* at A24), the court identified (*id.* at A25-A28) a number of "significant competing policy reasons that counsel against imposing a rigid exhaustion requirement" (*id.* at A25). Those considerations include the fact that many service members might prefer to have the option of seeking an immediate judicial remedy and the fact that extending the period within which a claim can be brought could make it more difficult to prove the claim, by increasing the risk of lost evidence, unavailable witnesses, and faded memories. *Id.* at A25-A26.

Third, petitioner contends that the court of appeals' approach "forecloses judicial review to an entire class of former military member[s] who first use[] the available * * * administrative remedy prior to instituting litigation." Pet. 8. Petitioner is not well-positioned to make that claim, because there were two and a half years remaining in the six-year limitations period when the Correction Board denied him relief. Pet. App. A27. In any event, a service member who is truly confronted with an approaching deadline can file suit in the Court of Federal Claims and move to stay the suit pending completion of the Board proceeding. *Id.* at A26-A27.

2. Contrary to petitioner's contention (Pet. 6), the decision below does not conflict with decisions of other courts of appeals holding that a correction-board decision was reviewable under the APA even though the limitations period for the underlying decision—in those cases, a discharge—had expired. The court of appeals correctly concluded (Pet. App. A33-A36) that those decisions are distinguishable, because they did not involve a claim for money damages under the Tucker

Act. The plaintiffs in those APA cases sought relief "other than money damages" (5 U.S.C. 702) and claimed to have been "adversely affected or aggrieved" (*ibid.*) by "final agency action" (5 U.S.C. 704). The challenged action was therefore the board's refusal to change the plaintiff's discharge status rather than the discharge itself. As the court of appeals observed, this distinction was recognized by "the very cases on which [petitioner] relies." Pet. App. A34.[3]

3. Review by this Court is particularly unwarranted in view of the passage of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012. Section 503 of that law (115 Stat. 1080-1085) added 10 U.S.C. 1558, which requires certain military claimants to exhaust an administrative remedy before filing suit. Section 1558(f)(1) provides that a person seeking to challenge an action or recommendation of a "selection board," or an action taken by the Secretary of a military department based on the report of a "selection board," is not entitled to relief in a judicial proceeding unless the action or recommendation has first been considered by a "special board" or the Secretary has denied the convening of a "special board" for such consideration. The term "selection board" encompasses a variety of military boards convened to make recommendations concerning appointment, promotion, separation, retirement, transfer, and other personnel actions. 10 U.S.C. 1558(b)(2)(A). The term "special board" has a similar definition (10 U.S.C.

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[3] See *Blassingame* v. *Secretary of Navy*, 811 F.2d 65, 72 (2d Cir. 1987); *Smith* v. *Marsh*, 787 F.2d 510, 511-512 (10th Cir. 1986); *Dougherty* v. *United States Navy Bd. for Corr. of Naval Records*, 784 F.2d 499, 501-502 & n.10 (3d Cir. 1986); *Geyen* v. *Marsh*, 775 F.2d 1303, 1308-1309 (5th Cir. 1985).

1558(b)(1)(A)), and includes a board for the correction of military records if it is designated a "special board" by the Secretary (10 U.S.C. 1558(b)(1)(B)).

Section 1558 does not apply to petitioner's action, because it was commenced before the Act's effective date. See 10 U.S.C. 1558 note. There may be future actions like petitioner's, moreover, that are not subject to Section 1558, because it does not require exhaustion of a correction-board remedy in all circumstances. Nevertheless, by requiring exhaustion of such a remedy prior to suit in some cases, the new statute diminishes the significance of the court of appeals' decision. As the court recognized (Pet. App. A14, A19), where exhaustion of an administrative remedy is mandatory, a plaintiff's claim ordinarily does not accrue until the conclusion of the administrative proceeding. See *Crown Coat Front Co.* v. *United States*, 386 U.S. 503 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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